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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

NATIONAL COUNCIL OF LA RAZA, LAS
VEGAS BRANCH OF THE NAACP
(BRANCH 1111), and RENO-SPARKS
BRANCH OF THE NAACP (BRANCH
1112),

Plaintiffs,

vs.

ROSS MILLER, in his official capacity as
Secretary of State of the State of Nevada;
and MICHAEL WILLDEN, in his official
capacity as Director of the Department of
Health & Human Services of the State of
Nevada,

Defendants.

CASE NO. 3:12-cv-00316-RCJ-VPC

DEFENDANTS' MOTION TO DISMISS

Defendant Ross Miller, Secretary of State, and Michael Willden, Director of the
Department of Health and Human Services, by and through counsel, Catherine Cortez Masto,
Attorney General, and Kevin Benson, Senior Deputy Attorney General hereby moves to
dismiss Plaintiffs' Complaint for failure to state a claim.

I. FACTS

For the purposes of a motion to dismiss, the Court must accept the facts alleged in the
Complaint (#1) as true. *Coal. for ICANN Transparency, Inc. v. VeriSign, Inc.*, 611 F.3d 495,
501 (9th Cir.2010). Defendants are not hereby admitting the truth of these allegations.

1 1. Defendant Ross Miller is the duly elected Secretary of State of Nevada, and as
2 such is the state's chief elections officer. Complaint ¶¶ 20, 32.

3 2. Defendant Michael Willden is the Director of the Department of Health and
4 Human Services ("DHHS"). Complaint ¶ 21.

5 3. The National Voter Registration Act ("NVRA") requires, among other things, that
6 states designate public assistance agencies as voter registration agencies, and that those
7 agencies provide certain services such as: providing voter registration forms, assistance with
8 filling out those forms, and transmitting the forms to the appropriate elections official.
9 Complaint ¶¶ 23, 24.

10 4. The NVRA provides a private right of action for persons aggrieved by a state's
11 failure to comply with the NVRA, and requires (in most cases) that the person give notice of
12 the violation to the state's chief elections officer before instituting suit. Complaint ¶ 29.

13 5. Plaintiffs allege that Nevada has violated the NVRA by failing to provide voter
14 registration forms and assistance with filling out those forms to all applicants for public
15 assistance. Complaint ¶ 42.

16 6. A November 2010 Census Bureau Current Population Survey indicates that in
17 Nevada, 47.6% of eligible citizens were registered to vote in households earning less than
18 \$25,000, while 72.4% of eligible citizens were registered in households earning more than
19 \$100,000. Complaint ¶ 43.

20 7. Nevada's reports to the Election Assistance Committee ("EAC") show that in the
21 2009-2010 reporting period, Nevada public assistance agencies received only 1,677 voter
22 registration forms, a substantial decrease from prior reporting periods. Complaint ¶ 44.

23 8. The organization Demos contacted the Secretary of State's Office in 2008 about
24 voter registration issues, and in response the Secretary issued a document in early 2009
25 discussing policy and procedures for complying with the NVRA. Complaint ¶ 45.

26 9. In December 2011, interviews with public assistance clients and state workers
27 were conducted at nine Division of Welfare and Supportive Services ("DWSS") offices and
28 certain Women, Infants, and Children ("WIC") offices. These interviews indicated that not

every single public assistance client was being provided with voter registration materials or assistance in completing the forms at those offices. Complaint ¶ 46.

10. On May 10, 2012, a letter was sent by Demos on behalf of Plaintiffs to the Secretary of State's Office. Complaint ¶ 47. A copy of the letter is attached to the Complaint as "Exhibit A."

11. The letter states that Nevada is not in compliance with Section 7 of the NVRA (42 U.S.C. § 1973gg-5), which requires public assistance agencies to provide certain voter registration materials and assistance. The letter further states: "the results of ***our most recent field investigations conducted in December 2011*** make clear that Nevada's public assistance offices still have not achieved compliance with their obligations under the NVRA." (Emphasis added.) Exhibit A to Complaint, p. 1.

12. The letter also states that it is intended to serve as the notice required pursuant to 42 U.S.C. § 1973gg-9(b), and that, if their demands are not met, Plaintiffs intend to file suit "at the conclusion of the statutory 20-day waiting period." Exhibit A to Complaint, p. 3.

13. The Plaintiffs commenced this lawsuit on June 11, 2012. Complaint (#1).

14. The Complaint contains a single cause of action for violation of Section 7 of the NVRA. Complaint, p. 21. It seeks a mandatory injunction to require Defendants to comply with the NVRA, a court-approved plan for compliance, which would include monitoring and reporting requirements, and that the court retain jurisdiction over the plan. Complaint, pp. 21-23. It also requests attorneys' fees. Complaint, p. 23.

II. POINTS AND AUTHORITIES

A. Standard for Dismissal.

On a motion to dismiss for failure to state a claim, the court must take all factual allegations in the complaint as true. *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000). The court must also draw all reasonable inferences in favor of the non-moving party. *Id.* However, dismissal is proper if it appears beyond a doubt that the plaintiff can prove no set of facts entitling him to relief. *Hydrick v. Hunter*, 500 F.3d 978, 985 (9th Cir. 2007).

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1 To bring an action in federal court, a plaintiff must have standing under Article III of the
 2 U.S. Constitution. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). If a plaintiff lacks of
 3 Article III standing, the case is subject to dismissal pursuant to Fed.R.Civ.P. 12(b)(1) because
 4 lack of constitutional standing deprives the federal courts of subject matter jurisdiction. *Maya*
 5 *v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011). To bring an action under a federal
 6 statute, a plaintiff must have not only Article III standing, but also statutory standing as well.
 7 *Id.* Lack of statutory standing will result in the case being dismissed for failure to state a claim
 8 pursuant to Rule 12(b)(6). *Id.*

9 B. The Complaint fails to state a claim because Plaintiffs did not comply with
 10 NVRA's notice provisions and therefore lacks statutory standing.

11 The NVRA provides for a private cause of action, but also generally requires that notice
 12 be given before a lawsuit is instituted. The statute provides in relevant part:

13 (b) Private right of action.

14 (1) A person who is aggrieved by a violation of this
 15 subchapter may provide written notice of the violation to the
 16 chief election official of the State involved.

17 (2) If the violation is not corrected within 90 days after
 18 receipt of a notice under paragraph (1), or within 20 days
 19 after receipt of the notice if the violation occurred within 120
 20 days before the date of an election for Federal office, the
 21 aggrieved person may bring a civil action in an appropriate
 22 district court for declaratory or injunctive relief with respect
 23 to the violation.

24 (3) If the violation occurred within 30 days before the date of
 25 an election for Federal office, the aggrieved person need
 26 not provide notice to the chief election official of the State
 27 under paragraph (1) before bringing a civil action under
 28 paragraph (2).

42 U.S.C. § 1973gg-9(b).

23 The purpose of the notice provisions is to give the state an opportunity to cure any
 24 alleged violations before facing litigation. *Association of Community Organizations for Reform*
 25 *Now v. Miller*, 129 F.3d 833, 838 (6th Cir. 1997). The notice provisions are mandatory.
 26 *Broyles v. Texas*, 618 F.Supp.2d 661, 691-92 (S.D.Tex. 2009) (*aff'd* 381 Fed.Appx. 370 (5th
 27 Cir. 2010)). Failure to give the required notice deprives a plaintiff of standing. *Georgia State*
 28 *Conference of N.A.A.C.P. v. Kemp*, ___ F.Supp.2d ___, 2012 WL 265925 at *12 (N.D.Ga.

2012). Accordingly, dismissal is required for failure to comply with the notice requirement. *Id.*; *Broyles*, 618 F.Supp.2d at 692.

If the violation occurs within 120 days of an election for Federal office, the state has 20 days to cure the violation from the receipt of the notice. 42 U.S.C. § 1973gg-9(b)(2). If the violation occurs more than 120 days from an election for Federal office, the state has 90 days to cure the violation. *Id.* For private lawsuits, the only exception to the notice provision is if the violation occurred within 30 days before an election for Federal office. *Id.* at 692; 42 U.S.C. § 1973gg-9(b)(3).

In this case, Plaintiffs sent a letter dated May 10, 2012 to the Secretary of State. The letter states that Plaintiffs' "**most recent** field investigations **conducted in December 2011**" revealed alleged violations of the NVRA. Exhibit A to Complaint, p. 1 (emphasis added). Similarly, the Complaint alleges that "interviews" conducted in December 2011 showed that not all public assistance clients were given voter registration materials or assistance. Complaint ¶ 46. The Complaint cites statistics from the Census Bureau and the EAC, but each of these dates to 2010 and earlier. Complaint ¶¶ 43, 44. Nothing in the letter or the Complaint identifies any violation that occurred later than December 2011. In fact, the notice affirmatively states that the Plaintiffs' "most recent" investigations occurred in December 2011.

Nevada's primary election was held on June 12, 2012, and that election included primary races for federal office. For purposes of the NVRA, the term "election" also includes "a convention or caucus of a political party which has authority to nominate a candidate." 42 U.S.C. § 1973gg-1(1); 2 U.S.C. § 431(1). Nevada's Republican caucus was held on February 4, 2012. Nevada Democratic caucus was held on January 21, 2012.

Thus the alleged violations in this case occurred within 120 of the caucuses, but more than 120 days before the primary election on June 12, 2012. However, Plaintiffs' notice letter, dated May 10, 2012, was sent months *after* the caucuses took place.

The NVRA, 42 U.S.C. § 1973gg-9(b)(2), provides in relevant part: "If the violation is not corrected within 90 days after receipt of a notice under paragraph (1), or within 20 days after receipt of the notice if *the violation* occurred within 120 days before the date of an election for

1 Federal office, the aggrieved person may bring a civil action..." (emphasis added).

2 At least with regard to the primary election, since the alleged violation occurred more
3 than 120 days before an election for Federal office, the Defendants were therefore entitled to
4 a statutory period of 90 days from the date of receiving the notice to cure the alleged
5 violations. 42 U.S.C. § 1973gg-9(b)(2).

6 Taking the allegations of the Complaint as true, the alleged violations occurred within
7 120 days of the caucuses, which ordinarily would permit the Defendants only 20 days to cure
8 the violation. *Id.* Or, if the alleged violation occurred within 30 days of an "election," then no
9 notice at all is required before bringing suit. 42 U.S.C. § 1973gg-9(b)(3). Clearly, the purpose
10 of these provisions is to twofold: (1) to give Defendants a fair opportunity to cure any alleged
11 violations *before* an up-coming election; and, (2) if the violation occurs very shortly *before* an
12 election, allow aggrieved persons to sue relief so they that they can be registered in time. See
13 *Miller*, 129 F.3d at 838.

14 With regard to the caucuses, the May 10, 2012 letter does not comply with the notice
15 requirements of the NVRA because it was sent *after* the caucuses occurred. Obviously, a
16 notice sent after the election in question has already occurred does not serve either purpose
17 behind the statute. Therefore the May 10, 2012 letter only serves as proper notice under 42
18 U.S.C. § 1973gg-9(b) for purposes of the June 12, 2012 primary. Since none of the alleged
19 violations occurred within 120 of the June 12, 2012 primary, Defendants are entitled to the
20 statutory period of 90 days to cure the alleged violations. 42 U.S.C. § 1973gg-9(b)(2).

21 If Plaintiffs had given prompt notice in December 2011, the Defendants could have
22 taken any necessary steps to cure the alleged violations ahead of the caucuses, and well
23 ahead of the June 12, 2012 primary. Instead, Plaintiffs inexplicably waited more than five
24 months after learning of the alleged violations to provide notice to the Secretary.

25 As the court explained in *Kemp*, the Plaintiffs lack standing under the NVRA unless and
26 until the 90 days has run and the violation remains uncured. ___ F.Supp.2d at ___, 2012 WL
27 265925 at *12. The purpose of the notice is to provide the state an opportunity to correct any
28 alleged violations before facing litigation. *Miller*, 129 F.3d at 838. This promotes prompt

1 compliance, and also avoids unnecessarily invoking judicial intervention.

2 In this case, the Complaint requests substantial involvement from this Court, including
3 retaining jurisdiction over a court-approved plan for compliance that would require on-going
4 monitoring and reporting requirements. Complaint, pp. 22-23. The Defendants take their
5 NVRA duties seriously, and intend to correct any deficiencies. But they have not been
6 afforded the statutorily-required opportunity to do so. If Defendants had been afforded the time
7 to cure as required by statute, this Court's intervention would not be necessary at all.

8 For these reasons, other courts facing this issue have held that failure to comply with
9 the NVRA's notice requirements deprives Plaintiffs of statutory standing and dismissal is
10 therefore required. *Kemp*, ___ F.Supp.2d at ___, 2012 WL 265925 at *12; *Broyles*, 618
11 F.Supp.2d at 692. Likewise, this Court should dismiss the present action. Plaintiffs have no
12 standing unless and until any alleged violations remain uncured after 90 days from receipt of
13 the May 10, 2012 notice.

14 CONCLUSION

15 The notice requirements of 42 U.S.C. § 1973gg-9(b)(2) are mandatory. The only
16 NVRA violations alleged in this case and in the May 10, 2012 notice letter occurred in
17 December 2011, more than 120 days before the June 12, 2012 primary. The alleged
18 violations occurred within 120 days before the caucuses, but the May 10, 2012 notice letter is
19 ineffective notice under 42 U.S.C. § 1973gg-9(b)(2) because it was sent *after* the caucuses
20 took place. The May 10, 2012 letter is only effective relative to the June 12, 2012 primary.
21 Defendants are therefore entitled to a 90-day period to cure the alleged violations of the
22 NVRA, which runs from the date of receiving the notice. The Plaintiffs' notice letter is dated
23 May 10, 2012. Since fewer than 90 days has elapsed since Defendants received that letter,
24 Plaintiffs lack standing under the NVRA.

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1 Defendants therefore respectfully request that this Court DISMISS the Plaintiffs'
2 Complaint in its entirety.

3 DATED this 3rd day of July, 2012.

4 CATHERINE CORTEZ MASTO
5 Attorney General

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CERTIFICATE OF SERVICE

I declare that I am an employee of the State of Nevada and on this 3rd day of July, 2012, I served a copy of the foregoing Defendants' Motion to Dismiss, by U.S. District Court

CM/ECF Electronic filing to:

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I further declare that I am an employee of the State of Nevada and on this 3rd day of July, 2012, I served a copy of the foregoing Defendants' Motion to Dismiss, by mailing the foregoing document via United States Postal Service to the following:

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